

# **LONGER WORKING AND HUMAN RIGHTS**

**Colm O’Cinneide**  
**Professor of Law**  
**UCL**

## THE CONTEXT

- A 'greying' European and global population. (DoH 2016: number of over-65s increases by almost 20,000 a year; Census 2016: average age increasing by more than a year to 37.4; IPH, 2016: by 2041, there will be 2.44 million aged 60 and over living on the island of Ireland, making up nearly one third of its total population.)
- Changing nature of the economy, which has a complex impact on different age cohorts – e.g. fewer jobs requiring physical labour, more jobs requiring IT skills.
- Greater social expectations that individual self-realisation through work will continue throughout life (DoH 2016: employment rate for adults aged 50-64 has increased 2014-2016, 58% to 63%. 19% of 65-69s still in employment in 2016 (9.7% of 70-74s): notably above EU average.)
- Increasing challenges to, and conscious of, stereotyping based on age. (DoH 2016: 45% of adults aged 50+ reported they felt discriminated against because of their age in the past 2 years.)

# Ageing and Human Rights

- It is rare for age discrimination to be explicitly acknowledged as a ‘wrong’ within human rights texts – at national or international level. Courts have also been reluctant to treat age as a ‘suspect’ ground of discrimination: see e.g. the Irish Supreme Court judgment in the Article 26 reference of the Employment Equality Bill 1996.
- Rights of older workers thus usually derived from general labour, equality and social rights guarantees.
- But see Article 21 of the EU Charter of Fundamental Rights, where age is included in that provision’s long list of non-discrimination grounds. See also Articles 1§2, 23 and 24 of the European Social Charter.
- Note also the recent moves at UN level to draw up a treaty on the human rights of older persons – the ‘Chung Report’ of 2010, and the ongoing proceedings of the UN Open-ended Working Group on Ageing established by General Assembly Resolution 65/182 in December 2010.

# The Legislative Prohibition on Age Discrimination

- The first mover – the US Age Discrimination in Employment Act 1967 (ADEA), prohibiting discrimination against the over 40s. (Mandatory retirement ages abolished in 1986.)
- Ireland first European country to enact a comprehensive ban on age discrimination via the EEAs 1999-2015 and ESAs 2000-2015, covering both younger and older workers.
- EU-wide prohibition on age discrimination in employment introduced via Article 6 of Directive 2000/78/EC in 2000, recognised to be an expression of the ‘general principle of equal treatment’ by the CJEU in C-144/04, *Mangold v Helm*, [2005] ECR I-9981.
- There now exists an extensive case-law on age discrimination, both before the Irish courts/ETs/WRC and at EU level in the CJEU.

# Key Features of the Legislative Prohibition

- Unusually, both direct and indirect discrimination on grounds of age can be objectively justified in line with EU law.
- See S. 34(4) EEA on retirement ages, which must be objectively justified (since 2015 now in line with EU requirements); s. 34(5) on maximum recruitment ages to get an adequate return on training; s. 34(3) on age limits in respect of access to/benefits from occupational pension schemes, including redundancy; s. 6(3)(b) allowing employers to fix a minimum recruitment age (18) and S. 6(3)(c) on fixed term contracts for employees older than a relevant retirement age.
- Sample case-law: *Equality Authority v. Ryanair* [2001] E.L.R 107 (ageist advert); *O'Farrell v Mercury Engineering*, DEC-E2012-096, 24.07.2012 (redundancy selection based on age); *Doyle v ESB International*, DEC-E2012-086 (retirement ages), *Flynn v Se Quirk Limited*, UD295/2015, May 2016 (unfair dismissal); *Hospira v Roper*, EDA 1315, 29.04.2013 (redundancy).

# Breaking News...

The screenshot shows a web browser displaying the RTÉ news website. The main headline reads "Solas employee awarded €20k in age discrimination case". The article is dated "Updated / Thursday, 25 Jan 2018 19:14". Below the headline is a photograph of the Workplace Relations Commission (WRC) building, with a sign that reads "WRC An Chúirt Oibreachais An Coimisiún um Chaidreamh san Áit Oibre Labour Court Workplace Relations Commission". To the right of the article is a square graphic with a colorful, abstract background and the RTÉ logo. The browser's taskbar at the bottom shows several open windows, including "Solas employee a...", "O' Cinneide General", "HDUpgrade\_panel...", "O' Cinneide age di...", "O' Cinneide age.p...", "O' Cinneide ULB s...", and "WRC Conference...".

## Beyond Existing Law

- Blackham, *Extending Working Life for Older Workers*, 2016: UK age discrimination law has had limited impact, there is a need for law reform, more proactive measures (including age-specific positive action and employer incentivisation) and effective leadership going forward.
- For other perspectives, see Macnicol, 2015 (positive action to redress ‘compulsory work’ and the growing poverty risk for under-skilled older workers); Loretto et al, 2016 (training and proactive management strategies); the various ILO initiatives on ageing and older workers.
- Note also the intersectional dimension: action on gender equality, carers, family status etc will impact on the employability of older workers.
- Finally, return again to the developing human rights agenda in respect of older persons – the ‘next frontier’?